Supreme Court, U.S.
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No. 99-1698

In The

Supreme Court of the United States

UNITED AIR LINES, INC., a Delaware corporation and AIR WISCONSIN, INC., a Wisconsin corporation,

Petitioners,

v.

CITY AND COUNTY OF DENVER, a home rule City and a Colorado municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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STATUTORY PROVISIONS

In addition to the D.R.M.C. provisions cited by Petitioner, the Respondent also refers to § 53-95(21), which states in pertinent part,

> *Sale* or *purchase* or *sale and purchase* includes installment and credit purchases and sales and the exchange of property or services that are taxable under the terms of this article as well as the purchase and sale thereof for money; and every transaction conditional or otherwise, based upon consideration constitutes a sale . . .

STATEMENT OF THE CASE

This case concerns the interpretation of Denver's use tax ordinances. United Air Lines and Air Wisconsin ("the Airlines") are interstate air carriers who were audited by the City and County of Denver in 1995. Both airlines were assessed Denver use tax on rotable aircraft parts. Rotable parts are those that may be repaired and reused. These parts may be shipped to different locations to be repaired and re-installed on airplanes as necessary.

The Denver use tax is levied on the " . . . taxable privilege of storing, using, distributing or consuming in the city . . . any article of tangible personal property, purchased at retail . . . " § 53-96, Denver Revised Municipal Code ("D.R.M.C." or "code"). The D.R.M.C. provides a credit for municipal sales and use taxes previously paid on such property as follows:

> It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that the provisions of this article shall apply to any person who has already paid a retail sales tax or use tax in respect to the sale of a service or tangible personal property taxable hereunder, to a municipal corporation organized and existing under the authority of the laws or the Constitution of any state in an amount less than the tax imposed by this article, and who thereafter causes a service or tangible personal property, taxable hereunder, to be used, stored, distributed or consumed in the city; but the tax imposed by this article shall, in any event, be measured by the difference between the amount imposed by this article and the amount previously imposed by the other municipality on said sale. If the retail sales tax imposed and paid to such municipal corporation aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder for the exercise of the privilege of using, storing, distributing or consuming such service or personal property in the city.

§ 53-92(c), D.R.M.C., Denver assessed use tax on parts stored by Air Wisconsin in Denver, which were shipped to Denver from Wisconsin. No prior sales or use tax was assessed on those parts by any other jurisdiction. Air Wisconsin agreed the parts were used in Denver and also agreed to the amount of this assessment if it is upheld.

Denver assessed use tax against United for parts stored and used in Denver by United. United agreed the parts were used in Denver and agreed the amounts assessed were correct if the assessment is upheld. A certain number of parts had been stored in California

before coming to Denver. United had paid sales and/or use taxes to various jurisdictions in California on those parts. Denver credited United with the sales and use tax payments made to all taxing jurisdictions in California, including nonmunicipal jurisdictions. This was done prior to the administrative hearing. No other tax credits were claimed by United in this audit. *See Stipulation of Fact* at pp. 13f-15f in the Appendix to the Airlines' Petition for Writ of Certiorari ("Airlines' Appendix"). Thus, no multiple taxation occurred in this case. The Airlines nevertheless protested the assessments to the administrative hearing officer, claiming that § 53-92(c), D.R.M.C., fails to expressly provide credit for nonmunicipal taxes previously paid. Thus, even though United was given such credit, the Airlines claimed this omission in the ordinance rendered the entire use tax article facially unconstitutional under the internal consistency prong of the dormant Commerce Clause.

PROCEEDINGS BELOW

Each airline's case was heard separately. In the United case, the hearing officer found that because United had received the relief it requested in the form of sales and use tax credits, United lacked standing to raise a constitutional challenge to the use tax ordinances.

In addressing the merits of United's internal consistency argument, she found that the Commerce Clause cases cited by United did not require "cross-credits" between every level of government. She concluded that as long as the state of Colorado provided a state tax

credit, and local governments provided local credit, the internal consistency test was satisfied by § 53-92(c), D.R.M.C.

She went on to find that even if the Constitution requires Denver to provide nonmunicipal credits, such a requirement automatically applies to the use tax by virtue of § 53-97(11), D.R.M.C., which is contained in the use tax article. That section exempts from taxation "[A]ll sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state." In other words, § 53-97(11) prohibits Denver from levying tax where the Constitution requires a credit or exemption.

In the Air Wisconsin proceeding, Air Wisconsin did not claim any credits for previously paid taxes and the standing issue was not raised. On the merits, the hearing officer made the same ruling she made in the United case.

Both airlines appealed to the Denver District Court (the trial court) and the cases were consolidated. The court took a different approach from the hearing officer, finding that the internal consistency test does require a system of "cross-credits", and that Denver does have to give credit for nonmunicipal taxes previously paid. The court also found that United had standing, even though United had already received the relief it requested.

The District Court affirmed the hearing officer's conclusion that § 53-97(11), D.R.M.C., preserves the constitutionality of the use tax ordinance. The court states that while § 53-97(11) does not directly provide credit for taxes previously paid, by " . . . construing that provision in the context of the use tax article as a whole, § 53-97(11)

permits that result." The court also finds that the term "sale" in § 53-97(11) includes any "sale and purchase" which triggers the application of use tax. § 53-95(21), § 53-96(1), D.R.M.C.

Denver did not appeal any portion of the decision. Thus, contrary to United's claims that Denver has acted inconsistently, Denver chose to abide by the decision and its requirement that Denver provide all state and local tax credits. Denver would not have given the credits in the first place had Denver not concluded there was a legal basis for doing so. The Airlines appealed to the Colorado Court of Appeals, again claiming that the use tax is unconstitutional, even though the Airlines won the case in District Court.

Denver did not contest the issue of providing credits in the Court of Appeals. However, because United raised the issue of lateral credits in its opening brief, Denver addressed the issue in Denver's answer brief. Denver argued that lateral credits were probably sufficient, but if not, the use tax was still constitutional under § 53-97(11), D.R.M.C., because it provided for other taxes to be credited as well.

The Court of Appeals upheld the decision of the District Court. It should be noted that the Court of Appeals found that the District Court *did not* rule that the use tax was unconstitutional on its face. Therefore, the Court of Appeals addressed only the constitutionality of the use tax as applied. *See* p. 8d in Airlines' Appendix.

The Airlines again appealed, to the Colorado Supreme Court, even though they won in the Court of Appeals. The Colorado Supreme Court initially granted

the Airlines' Petition for Writ of Certiorari. After the submission of briefs and oral argument, the Court dismissed the writ as having been improvidently granted. The same day, the Court issued a decision in *General Motors v. City and County of Denver,* 990 P.2d 59 (Colo. 2000). The *General Motors* case also concerned the credit issue, but was factually different from the Airlines' cases. Pursuant to a motion by the Airlines, the Court withdrew its earlier order denying certiorari, reinstated the petition, and affirmed the Court of Appeals decision. The Court also stated, without further elaboration, that its decision in the *General Motors* case addressed the issues in the Airlines' case. *See* pp. 1a-3a, in the Airlines' Appendix. Thus, there is no decision on the merits from the Colorado Supreme Court in the present case. The Airlines are essentially trying to appeal the *General Motors* decision in this case. General Motors did not appeal their case to this Court.

The Airlines now seek certiorari in this Court, not on the Commerce Clause issue, but on the due process notion of vagueness. Vagueness was never raised or argued in any of the lower courts. The only reference to this issue is by the Colorado Supreme Court in *General Motors* in a footnote, where the Court suggests *in dicta* that the D.R.M.C. might not alert taxpayers to the various credits allowed. The Court acknowledges that General Motors did not complain of insufficient notice, and the Court concludes that "the notice issue may never arise." *See General Motors* opinion at page 19c in the Airlines' Appendix.

REASONS FOR DENYING THE PETITION

1. The Airlines did not comply with Rule 14(1)(g)(i) of the Rules of the United States Supreme Court.

According to Rule 14(1)(g)(i), on review of a state court judgment, the Petitioner must show where the federal question sought to be reviewed was raised in the lower courts, and that such issue was properly and timely raised. As stated above, the issue of vagueness under the Due Process Clause was never raised by the Airlines nor ruled upon in the lower courts. There is no record upon which to make a ruling on this issue. Therefore this issue is not properly or timely raised.

Moreover, the Airlines were not prejudiced by any alleged "lack of notice" or vagueness in the ordinance. To the contrary, United requested credits and was given the credits before its case ever went to a hearing. United had not paid the assessment before the credits were figured so United did not overpay any taxes for which credit was due. Air Wisconsin was not entitled to any credits so it cannot now complain of lack of notice.

2. This case concerns the interpretation of a local ordinance and does not present an important federal question.

As Denver did not appeal the decision of the District Court which requires Denver to provide credit for all state and local sales and use taxes paid on property which becomes taxable in Denver, the Commerce Clause

issue is no longer in dispute. The District Court concluded that Denver must provide such credits under the Constitution and Denver did not appeal that ruling.

The Airlines continued to argue that the lack of specific credit language for nonmunicipal taxes in § 53-92(c), D.R.M.C., made the use tax altogether unconstitutional, regardless of § 53-97(11), D.R.M.C. Thus, the only issue before the Colorado Court of Appeals and the Colorado Supreme Court was whether § 53-97(11), D.R.M.C., serves to require such credits given the lack of specific language in § 53-92(c). This case is therefore strictly a matter of interpreting a local ordinance, which this Court has left to the judgment of the state courts. *United Air Lines v. Mahin*, 410 U.S. 623, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973).

There is no federal question properly before this Court because the constitutional issue has already been decided and not appealed by Denver. Thus, under Rule 10 of the rules of this Court, the Airlines have shown no compelling reason why the Court should grant discretionary review.

3. Denver's use tax is not unconstitutionally vague

The vagueness component of the Due Process Clause may invalidate a statute if the statute does not inform a person of ordinary intelligence what conduct the law requires or forbids, or if the statute speaks with such uncertainty that it permits arbitrary enforcement. *Missourians for Tax Justice Ed. Project v. Holden*, 959 S.W.2d 100 (Mo. 1997). The Airlines have failed to show that the ordinances in question violate Due Process.

To begin with, at page 10 of their Petition, the Airlines admit that "the use tax scheme is clear in its scope and operation". On page 15, they state that there is no ambiguity or vagueness on the face of §§ 53-92(c) and 53-97(11), D.R.M.C. The Airlines then allege that it is the Colorado Supreme Court's "rewriting" (p. 13) of the code in *General Motors* that makes the code vague. The terms of the ordinances cannot be clear and vague at the same time.

Furthermore, the Court in *General Motors* did not rewrite anything. The Court simply said that the Constitution requires the credits which United received, and the code is not unconstitutional for failing to spell that out in § 53-92(c), D.R.M.C. The Court found that § 53-97(11), D.R.M.C., requires the credits to be given, and therefore, the code is constitutional. The Court states at page 20(c) of the Airlines Appendix,

> Our interpretation of D.R.M.C. § 53-97(11) saves Denver's use tax from constitutional infirmity. However, Denver must provide GM with a credit for the sales and use taxes paid to other states and their subdivisions such that GM will pay no more tax on the automobiles than it would have paid by purchasing the component parts in the City and County of Denver, State of Colorado.

This ruling is perfectly clear. By its terms, the decision states that § 53-97(11), D.R.M.C., provides notice of the credit. The terms of the ordinances were not changed. The Airlines fail to indicate what language in the ruling is vague. Moreover, this Court has upheld the constitutionality of a statutory scheme where the state court has

concluded that one statutory provision is to be read into another. *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

The Airlines have placed great weight on the "legislative intent" of § 53-92(c), D.R.M.C., to only provide municipal tax credits. The Airlines do not explain why similar weight should not be accorded to § 53-97(11), D.R.M.C., which expresses a clear intent that the code not violate any provision of the Constitution.

The Colorado Supreme Court also disregards the Airlines' contention that credits are different from exemptions as the term "exemption" is used in the heading of § 53-97, D.R.M.C. At page 19c of the Airlines' Appendix, the Court in *General Motors* states "we interpret 'exemption' only to reduce the tax owed Denver by the amount of sales and use tax paid to other state and sub-state taxing jurisdictions."

Contrary to the Airlines' contention that the code fails to adequately notify taxpayers, what the Airlines seem to be worried about is the interpretation of the code by the City. As with any judicial mandate that affects the interpretation of a local ordinance, the City is bound by the decisions in both the *United* case and the *General Motors* case. These decisions overrule any contrary position previously taken by the City. The suggestion that Denver would blatantly disregard a rule of law in this context is ludicrous.

Whether a taxpayer avails itself of a credit is the taxpayer's responsibility. The taxpayer must be aware of the laws in a taxing jurisdiction and apply for any appropriate credits. This is true in any taxing context. And as

the Airlines themselves point out at pages 3-4 of the Petition, the taxpayer files a use tax return which provides a section for taking credits and exemptions.

Nor is there a need in this instance for "minimum guidelines" in order to apply the credits. Either the taxpayer applies for the credit or it does not. If asked for and substantiated, the credit must be given. There is no discretion on the part of City auditors, nor are the code provisions so unclear as to afford latitude for subjective application. *Big Mama Rag, Inc., v. United States,* 631 F.2d 1030, 1034 (D.C. Cir. 1980). United does not complain of the manner in which the credit was computed. United agreed to the stipulated assessment after the credits were applied. In addition, due to the automatic nature of the credit, the Airlines have not shown that there is a danger of arbitrary enforcement. The credit mechanism worked precisely as it should have in this case and the Airlines have presented no evidence of the due process dangers they allege.

Many of the Due Process cases cited by the Airlines concern situations where a statute's failure to inform an individual of prohibited conduct resulted in the imposition of a penalty. *See, e.g., Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). This Court in *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), requires that such "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." Here, there is no conduct to be prohibited. And there is no penalty for failing to apply for a credit.

This Court will, if possible, construe a statute so as to render it constitutional. *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1954). The highest court in Colorado has done so in this case. The Airlines have failed to demostrate any Due Process violation, or any other grounds for granting discretionary review in this matter.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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